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PRIVILEGE, MALICE, AND INTENT.

THE law of torts as now administered has worked itself into substantial agreement with a general theory. I should sum up the first part of the theory in a few words, as follows. Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as is consistent with paramount considerations to be mentioned. When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen. If common experience has shown that some such consequence was likely to follow the act under the circumstances known to the actor, he is taken to have acted with notice, and is held liable, unless he escapes upon the special grounds to which I have referred, and which I shall mention in a moment. The standard applied is external, and the words malice, intent and negligence, as used in this connection, refer to an external standard. If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.

Furthermore, so far as liability for an act depends upon its probable consequences without more, the liability usually is not affected by the degree of the probability if it is sufficient to give the defendant reasonable warning. In other words, for this

purpose commonly it does not matter whether the act is called malicious or negligent. To make out a *primâ facie* case of trespass or libel, if the likelihood of bringing force to bear on the plaintiff's person or of bringing him into contempt goes to the height expressed by the word negligence, as above explained, it need not go higher. There are exceptions, at least in the criminal law. The degree of danger under the known circumstances may make the difference between murder and manslaughter.[1] But the rule is as I have stated. The foregoing general principles I assume not to need further argument.[2]

But the simple test of the degree of manifest danger does not exhaust the theory of torts. In some cases, a man is not liable for a very manifest danger unless he actually intends to do the harm complained of. In some cases, he even may intend to do the harm and yet not have to answer for it; and, as I think, in some cases of this latter sort, at least, actual malice may make him liable when without it he would not have been. In this connection I mean by malice a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another.[3] The question whether malice in this sense has any effect upon the extent of a defendant's rights and liabilities, has arisen in many forms. It is familiar in regard to the use of land in some way manifestly harmful to a neighbor. It has been suggested, and brought to greater prominence, by boycotts, and other combinations for more or less similar purposes, although in such cases the harm inflicted is only a means. and the end sought to be attained generally is some benefit to the defendant. But before discussing that, I must consider the grounds on which a man escapes liability in the cases referred to, even if his act is not malicious.

It will be noticed that I assume that we have got past the question which is answered by the test of the external standard. There is no dispute that the manifest tendency of the defendant's act is to inflict temporal damage upon the plaintiff. Generally, the result is expected, and often at least it is intended. And the first question that presents itself is why the defendant is not liable without going further. The answer is suggested by the common-

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[1] Bigelow, Fraud, 117, n. 3; Commonwealth *v.* Pierce, 138 Mass. 165. Compare Hanson *v.* Globe Newspaper Co., 159 Mass. 293.

[2] See The Common Law, ch. 2, 3, 4.

[3] See Rideout *v.* Knox, 148 Mass. 368, 373.

place, that the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause.[1] When the defendant escapes, the court is of opinion that he has acted with just cause. There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of.

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair.

For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already. He has a right to build a house upon his land in such a position as to spoil the view from a far more valuable house hard by. He has a right to give honest answers to inquiries about a servant, although he intends thereby to prevent his getting a place. But the reasons for these several privileges are different. The first rests on the economic postulate that free competition is worth more to society than it costs. The next, upon the fact that a line must be drawn between the conflicting interests of adjoining

[1] Walker *v.* Cronin, 107 Mass. 555, 562; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 613, 618.

owners, which necessarily will restrict the freedom of each;[1] upon the unavoidable philistinism which prefers use to beauty when considering the most profitable way of administering the land in the jurisdiction taken as one whole; upon the fact that the defendant does not go outside his own boundary; and upon other reasons to be mentioned in a moment. The third, upon the proposition that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate. I do not know whether the principle has been applied in favor of a servant giving a character to a master.

Not only the existence but the extent or degree of the privilege will vary with the case. Some privileges are spoken of as if they were absolute, to borrow the language familiar in cases of slander. For instance, in any common case, apart from statutory exceptions, the right to make changes upon or in a man's land is not affected by the motive with which the changes are made. Were it otherwise, and were the doctrine carried out to its logical conclusion, an expensive warehouse might be pulled down on the finding of a jury that it was maintained maliciously, and thus a large amount of labor might be wasted and lost. Even if the law stopped short of such an extreme, still, as the motives with which the building was maintained might change, the question would be left always in the air. There may be other and better reasons than these and those mentioned before, or the reasons may be insufficient.[2] I am not trying to justify particular doctrines, but to analyze the general method by which the law reaches its decision.

So it has been thought that refusing to keep a man in one's service, if he hired a house of the plaintiff, or dealt with him, was absolutely privileged.[3] Here the balance is struck between the benefit of unfettered freedom to abstain from making that contract, on the one side, and the harm which may be done by the particular use of that freedom, on the other.

It is important to notice that the privilege is not a general one, maliciously to prevent making contracts with the plaintiff, but is attached to the particular means employed. It is a privilege to

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[1] See Middlesex Company *v.* McCue, 149 Mass. 103, 104; Boston Ferrule Company *v.* Hills, 159 Mass. 147, 149, 150.

[2] See 1 Ames & Smith, Cases on Torts, 750, n.

[3] Heywood *v.* Tillson, 75 Me. 225; Payne *v.* Western & Atlantic R. R., 13 Lea, 507. See Capital & Counties Bank *v.* Henty, 7 App. Cas. 741.

abstain from making a certain kind of contract oneself, whether maliciously, in order to prevent others from contracting with the plaintiff, or for a more harmless motive. Still more important it is, and more to the point of this paper, that, in spite of many general expressions to the contrary, the conclusion does not stand on the abstract proposition that malice cannot make a man liable for an act otherwise lawful. It is said that if this were not so a man would be sued for his motives. But the proposition is no more self-evident than that knowledge of the circumstances under which an act is done cannot affect liability, since otherwise a man would be sued for his knowledge, a proposition which is obviously untrue. In a proper sense, the state of a man's consciousness always is material to his liability, and when we are considering the extent of a man's privilege knowingly to inflict pecuniary loss upon his neighbor, it would not be surprising to find that in some cases motives made all the difference in the world. I pass to the inquiry, whether privilege, sometimes at least, is not dependent upon the motives with which the act complained of is done.

Take a case where, as in the last one, the harm complained of is a malicious interference with business, but where the means employed (the act of the defendant) are different. I assume that the harm is recognized by the law as a temporal damage, that not being the object of this discussion. I assume also that the defendant's act is not unlawful or a cause of action unless it is made so by reason of the particular consequence mentioned, and the defendant's attitude toward that consequence. I assume, finally, that the acts or abstinences of third persons induced by the defendant are lawful. If a case could be put where the defendant's act was justified by no grounds of policy more special or other than the general one of letting men do what they want to do, it would present the point which I wish to raise. Such a case I find hard to imagine, but if one should occur, I think courts would say that the benefit of spontaneity was outweighed by the damage which it caused.[1] The gratification of ill-will, being a pleasure, may be called a gain, but the pain on the other side is a loss more important. Otherwise, why allow a recovery for a battery? There is no general

[1] Possibly, one is suggested by Keeble *v.* Hickeringill, 11 East, 574, n., and Tarleton *v.* M'Gawley, Peake, 205, — we may suppose people to be kept away from the plaintiff by the malicious firing of guns, otherwise lawful. These cases will be found in 1 Ames & Smith, Cases on Torts, which contains an excellent selection of decisions bearing on the subject of this article.

policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm.

But there is no need to stay in such thin air. Let us suppose another case of interference with business by an act which has some special grounds of policy in its favor. Take the case of advice not to employ a certain doctor, given by one in a position of authority. To some extent it is desirable that people should be free to give one another advice. On the other hand, commonly it is not desirable that a man should lose his business. The two advantages run against one another, and a line has to be drawn. So absolute a right of way may not be given to advice as to abstaining from some contracts which have been mentioned. In such a case, probably it would be said that if the advice was believed to be good, and was given for the sake of benefiting the hearers, the defendant would not be answerable. But if it was not believed to be for their benefit, and was given for the sake of hurting the doctor, the doctor would prevail.[1] If the advice was believed to be good, but was volunteered for the sake of doing harm only, courts might differ, but some no doubt would think that the privilege was not made out.[2] What the effect of bad faith without malice would be is outside my subject.

It will be seen that the external standard applied for the purpose of seeing whether the defendant had notice of the probable consequences of his act, has little or nothing to do with the question of privilege. The defendant is assumed to have had notice of the probable consequences of his act, otherwise the question of privilege does not arise. Generally the harm complained of is not only foreseen but intended. If there is no privilege, the difference between notice of consequences and malice is immaterial. If the privilege is absolute, or extends to malicious acts, of course it extends to those which are not so. If the privilege is qualified, the policy in favor of the defendant's freedom generally will be found to be qualified only to the extent of forbidding him to use

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[1] See Morasse *v.* Brochu, 151 Mass. 567; Tasker *v.* Stanley, 153 Mass. 148; Delz *v.* Winfree, 80 Texas, 400, 405. The cases often are obscure as to the precise nature of the act done, which seems to me a most important fact. In Lumley *v.* Gye, 2 El. & Bl. 216, the allegation was that the defendant "enticed and procured" the third person to break the contract. In Bowen *v.* Hall, 6 Q. B. D. 333, the defendant Hall persuaded another to break his contract (pp. 338, 339). In Old Dominion Steamship Co. *v.* McKenna, 30 Fed. Rep. 48, the defendant "procured plaintiff's workmen" to leave their work, and so on.

[2] See Stevens *v.* Sampson, 5 Ex. D. 53.

for the sake of doing harm what is allowed him for the sake of good. Suppose, for instance, advice is given which manifestly tends to injure the plaintiff, but without thinking of him in fact, and that the advice would be privileged unless given in bad faith or maliciously, if expressly directed against the plaintiff. The advice could not be given maliciously as against the plaintiff unless he either was thought of, or was embraced in a class which was thought of.

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree. Even the economic postulate of the benefit of free competition, which I have mentioned above, is denied by an important school.

Let me illustrate further. In England, it is lawful for merchants to combine to offer unprofitably low rates and a rebate to shippers for the purpose of preventing the plaintiff from becoming a competitor, as he has a right to do, and also to impose a forfeiture of the rebate, and to threaten agents with dismissal in case of dealing with him.[1] But it seems to be unlawful for the officer of a trade union to order the members not to work for a man if he supplies goods to the plaintiff, for the purpose of forcing the plaintiff to abstain from doing what he has a right to do.[2]

In the latter case the defendant's act, strictly, was giving an order, not refusing to contract; but perhaps the case would have been decided the same way if the same course had been adopted by unanimous vote of the union.[3] So the right to abstain from contracting is not absolutely privileged as against interference with business. The combination and the intent to injure the plaintiff,

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[1] Mogul Steamship Company, Limited, *v.* McGregor, 1892, App. Cas. 25; 23 Q. B. D. 598. See also Bowen *v.* Matheson, 14 Allen, 499 (1867); Bohn Manufacturing Company *v.* Hollis, 55 N. W. R. 1119 (Minnesota, 1893).

[2] Temperton *v.* Russell, 1893, 1 Q. B. 715.

[3] See Carew *v.* Rutherford, 106 Mass. 1, and the cases below, as to combination. See, also, the further comments toward the end of this article.

without more, do not seem to be the ground. Both those elements were present to an equal degree in the Mogul Steamship Company's case. It is true the jury found malice. But looking at the evidence, the instructions of the judge, and the judgments, evidently they did not mean that the ultimate motive of the defendants was not to benefit themselves. The defendants meant to benefit themselves by making the plaintiff submit, just as, in the other case, the defendants meant to benefit themselves by driving the plaintiff away. It might be said that the defendants were free not to contract, but that they had no right to advise or persuade the contractors who would have dealt with the plaintiff not to do so, and that, by communicating the union's willingness to deal with the contractors, if they would not deal with the plaintiff, the defendants were using such persuasion. But if this refinement is not a roundabout denial of the freedom not to contract, since a man hardly is free in his abstaining unless he can state the terms or conditions upon which he intends to abstain, at all events the same mode of reasoning could be used in the cases where the defendant escapes. The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue.

Another illustration may be drawn from other cases upon boycotts. Acts which would be privileged if done by one person for a certain purpose may be held unlawful if done for the same purpose in combination.[1] It is easy to see what trouble may be found in distinguishing between the combination of great powers in a single capitalist, not to speak of a corporation, and the other form of combination.[2] It is a question of degree at what point the combination becomes large enough to be wrong, unless the knot is cut by saying that any combination however puny is so. Behind all is the question whether the courts are not flying in

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[1] See State *v.* Donaldson, 32 N. J. L. 151; State *v.* Glidden, 55 Conn. 46; Crump *v.* Commonwealth, 84 Va. 927; Lucke *v.* Clothing Cutters' & Trimmers' Assembly No. 7, 507, K. of L., 26 Atl. R. 505; Jackson *v.* Stanfield, 35 N. E. R. 345 (Indiana, 1894); Mogul Steamship Company *v.* McGregor, 23 Q. B. D. 598, 616; 1892, App. Cas. 25, 45. The cases are not quite unanimous, Bohn Manufacturing Co. *v.* Hollis, 55 N. W. R. 1119 (Minnesota, 1893).

[2] 23 Q. B. D. 617.

the face of the organization of the world which is taking place so fast, and of its inevitable consequences. I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an articulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.

To sum up this part of the discussion, when a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification. The most important justification is a claim of privilege. In order to pass upon that claim, it is not enough to consider the nature of the damage, and the effect of the act, and to compare them. Often the precise nature of the act and its circumstances must be examined. It is not enough, for instance, to say that the defendant induced the public, or a part of them, not to deal with the plaintiff. We must know how he induced them. If by refusing to let them occupy a building, or to employ them, the answer may be peremptory in his favor, without regard to other circumstances. If by acts wrongful for other reasons, the answer falls outside my subject. If by advice, or combined action not otherwise unlawful, motive may be a fact of the first importance. It is entirely conceivable that motive, in some jurisdictions, should be held to affect all, or nearly all, claims of privilege. The cases which I have cited, by way of illustration, come from different States, and might not be regarded as being so consistent with each other as I have assumed them to be. But in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed. I only wish to add that thus far, when the act of a third person is nearer to the harm than the act of the defendant, I have assumed the former to be lawful. I have said nothing as

yet of privilege in connection with wrongful acts of others. Also, I have left on one side exceptional cases where the act induced by the defendant would have been a tort or a crime had the third person had his knowledge, for instance, the innocent giving of a poisoned apple. If the harm were of a more serious nature than loss of business, that naturally would narrow the privilege, but it is not likely to be so in the cases which I have had in mind.

I now pass to an entirely different class of cases. In these, intent to produce the harm complained of has an importance of its own, as distinguished from notice of danger on the one side, and from actual malice on the other. To begin at a little distance, one of the difficulties which must occur to every one in thinking of the external standard of liability is: if notice so determined is the general ground, why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, some one will buy a pistol of him for some unlawful end? I do not think that the whole answer to such questions is to be found in the doctrine of privilege. Neither do I think that any instruction is to be got from the often-repeated discussions as to cause. It is said that the man whose wrong-doing is nearest to the injury is the only cause of it. But, as is pointed out in Hayes *v.* Hyde Park,[1] a man whose act is nearest to the injury is as much a cause when his act is rightful, as when it is wrongful. Yet an intervening act may not exonerate the defendant.

The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be. There may have been some nibbling at the edges of this rule in strong cases, for instance, where only the slight negligence of a third person intervenes, or where his negligence plays only a subordinate part, but the rule hardly will be disputed. It applies in favor of wrong-doers as well as others. The classical illustration is, that one who slanders another is not liable for the wrongful repetition of the slander without his authority, but the principle is general.[2] If the repetition were privileged, and so rightful,

[1] 153 Mass. 514.

[2] Ward *v.* Weeks, 7 Bing. 211, 215; Cuff *v.* Newark & New York R. R., 6 Vroom, 17, 32; Clifford *v.* Atlantic Mills, 146 Mass. 47; Tasker *v.* Stanley, 153 Mass. 148, 150.

and also were manifestly likely to happen, the law might be otherwise.[1]

But the case is different when a defendant has not stopped at the point of saying, I take it for granted that my neighbors will keep to the law, and I shall not let myself be checked in doing what I like, by the danger which there would be, if they acted unlawfully; when, instead, he not only has expected unlawful conduct, but has acted with the intent to bring about consequences which could not happen without the help of such unlawful acts on the part of others. The difference is illustrated by the difference between the general right of a landowner, as against trespassers, to put his land in what condition he likes, and his liability, even to trespassers (without notice), for man-traps or dog-spears. In the latter case, he has contemplated expressly what he would have had a right to assume would not happen, and the harm done stands just as if he had been on the spot and had done it in person. His intent may be said to make him the last wrong-doer.[2]

So when the wrongful act expected is that of a third person, and not of the plaintiff, the defendant may be liable for the consequences of it. There is no doubt, of course, that a man may be liable for the unlawful act of another, civilly as well as criminally, and this now is pretty well agreed when the act is a breach of contract as well as when it is a tort.[3] He is liable, if having authority he commands it; he may be liable if he induces it by persuasion. I do not see that it matters how he knowingly gives the other a motive for unlawful action, whether by fear, fraud, or persuasion, if the motive works. But, in order to take away the protection of his right to rely upon lawful conduct, you must show that he intended to bring about consequences to which that unlawful act was necessary. Ordinarily, this is the same as saying that he must have intended the unlawful act. To sum the matter up in a rule, where it is sought to make a man answerable for damage, and the act of a third person is nearer in time than the defendant's to the harm, if the third person's act was lawful, it stands like the workings of nature, and the question is whether it reasonably was

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[1] Elmer *v.* Fessenden, 151 Mass. 359, 362, and cases cited. See Hayes *v.* Hyde Park, 153 Mass. 514.

[2] Bird *v.* Holbrook, 4 Bing. 628, 641, 642. See Jordin *v.* Crump, 8 M. & W. 782; Chenery *v.* Fitchburg R. R., 35 N. E. Rep. 554, 555.

[3] Lumley *v.* Gye, 2 El. & Bl. 216; 1 Ames & Smith, Cases on Torts, 600, 612, note by Professor Ames.

to be anticipated or looked out for; but if the third person's act was unlawful, the defendant must be shown to have intended the act, or at least to have expected it, and to have intended consequences which could not happen without the act.[1]

Although actual intention is necessary in this class of cases, malice commonly is not so, except so far as the question of liability for an intervening wrong-doer is complicated with a question of privilege. The damage is assumed to be inflicted unlawfully, since the act of the third person which is nearest to it is assumed to be unlawful. If the defendant has no notice that the third person's act will or may be unlawful, he is free on general principles. But, notwithstanding the reserves of Bowen *v.* Hall,[2] if he knows that the act will be unlawful, it seems plain that persuasion to do it will make him liable as well when not malicious as when malicious. I cannot believe that *bona fide* advice to do an unlawful act to the manifest harm of the plaintiff ought to be any more privileged than such advice, given maliciously, to do a lawful act. Of course, I am speaking of effectual advice. It seems to me hard for the law to recognize a privilege to induce unlawful conduct. But, whether there is such a privilege or not, what I am driving at is, that apart from privilege there is no defence; that is to say, that malice is not material, on any other ground than that of privilege, to liability for the wrongful act of another man.

At this point, then, we have come again upon the question of privilege. When the purpose of the defendant's act is to produce the result complained of by means of illegal acts of third persons, his privilege will be narrower than when he intends to induce only legal acts. As I have said, I do not suppose that the privilege extended to honest persuasion to do harm to the plaintiff by lawful conduct, would extend to similar persuasion to do it by unlawful conduct. Take acts of which the privilege is greater. Could a man refuse to contract with A unless he broke his contract with B? There are cases by respectable courts which look as if he could

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[1] I venture to refer to a series of cases in which my views will be found illustrated. Hayes *v.* Hyde Park, 153 Mass. 514; Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 247; Tasker *v.* Stanley, 153 Mass. 148. [Note that, in this case, it did not appear that the conduct advised (the departure of the plaintiff's wife) would have been unlawful in any sense, on the facts assumed as the basis of the advice. It did not appear what those facts were. The question of privilege, therefore, was the main one.] Elmer *v.* Fessenden, 151 Mass. 359, 362; Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47.

[2] 6 Q. B. D. 333, 338.

not.[1] What I have called heretofore the privilege not to contract really is only the negative side of a privilege to make contracts. I stated it in the negative way in order to make the claim of an absolute privilege more plausible. But the right not to contract in a certain event, and to say that you will not, means nothing unless it is implied that you offer a contract, that is, an act on your part, in the other event. If no such offer is understood, then you simply refuse to contract, whatever happens, which undoubtedly you may do. But there is no absolute privilege to make agreements which are not unlawful on their face, that is to say, which do not necessarily and always tend to produce a result that the law wishes to prevent. An agreement may be unlawful, because under the particular circumstances it tends to produce such a result, although in general harmless.

The question has arisen, how close the connection must be between an agreement — for instance, a sale — and the result sought to be prevented, in order to make the sale unlawful. I presume that the same degree of connection which would have that effect would make the seller liable if the result in question was a tort. In Graves *v.* Johnson,[2] where intoxicating liquor was found to have been sold in Massachusetts, "with a view to" an illegal resale by the purchaser in Maine, a majority of the court interpreted the words quoted as meaning that the seller intended that the buyer should resell unlawfully, and was understood by the latter to be acting in aid of that purpose, and held the sale unlawful. But it may be conjectured that the decision would have been different if the seller merely had known of the buyer's intent without encouraging it or caring about it.

In questions of privilege, the nature of the defendant's act, the nature of the consequences, and the closeness of the bond between them, may vary indefinitely. We may imagine the conduct to be of the most highly privileged kind, like the use of land, and to consist of imposing conditions upon the letting of rooms or the removal of a building cutting off a view. We may imagine the conditions to be stated with intent, but without any persuasion or advice, that they should be satisfied, and we may imagine them to be illegal acts anywhere from murder down to breach of a con-

[1] Temperton *v.* Russell (1893), 1 Q. B. D. 715, mentioned above for a different point. In this case, there was the additional element of combination. See the other cases cited above, p. 8 n.

[2] 156 Mass. 211.

tract to take the *Herald* for a month. Interesting cases of such a kind might be framed for a moot court, although I hardly expect to meet one in practice. But, as I have said, my object is not to decide cases, but to make a little clearer the method to be followed in deciding them.

Oliver Wendell Holmes, Jr.